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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of:

Joint Application of AT&T Corporation and  
Tele-Communications, Inc. for Transfer of  
Control to AT&T of Licenses and  
Authorizations Held By TCI and Its Affiliates  
Or Subsidiaries

CS Docket No. 98-178

REPLY IN OPPOSITION OF GTE

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## TABLE OF CONTENTS

|   | Page |
|---|------|
| I. INTRODUCTION AND SUMMARY .....   | 2    |
| II. THERE IS BROAD SUPPORT FOR THE IMPOSITION OF ILEC-LIKE<br>CONDITIONS ON THE MERGED ENTITY. ....   | 6    |
| III. THE COMMISSION MUST REQUIRE AT&T/TCI TO ALLOW<br>COMPETITORS OPEN ACCESS TO ITS BROADBAND CABLE<br>FACILITIES.....   | 12   |
| A. The Proposed Merger Would Have Serious Anticompetitive Effects<br>on the Provision of Bundled Services Solely Because of<br>AT&T/TCI's Refusal to Provide Open Access to Its Broadband<br>Facilities. .... | 12   |
| B. The Merger Raises Additional Vertical Exclusion Concerns.....  | 15   |
| C. Based On These Concerns, An Open Access Requirement Is<br>Necessary. ....  | 16   |
| IV. CONCLUSION .....  | 18   |

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**REPLY IN OPPOSITION OF GTE**

GTE Service Corporation and its below-listed affiliates<sup>1</sup> (collectively, "GTE") hereby file their reply in opposition to the proposed acquisition of TCI by AT&T. As detailed herein, there is broad record support for imposition of the conditions sought by GTE in its Comments in Opposition.<sup>2</sup> Specifically, there is consensus from virtually every industry segment for extending ILEC-type regulation to AT&T/TCI and requiring open, non-discriminatory access to TCI's broadband cable facilities. Accordingly, and in order to preserve competition and consumer choice, GTE again urges the

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<sup>1</sup> GTE Alaska, Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., GTE West Coast Incorporated, and Contel of the South, Inc., GTE Communications Corporation, GTE Wireless Incorporated, GTE Internetworking, and GTE Media Ventures Incorporated. This reply pertains to issues raised by the proposed transfer of CARS licenses held by TCI and its subsidiaries and affiliates.

<sup>2</sup> Comments in Opposition of GTE, CS Docket No. 98-178, filed Oct. 29, 1998. All comments cited in this reply were filed in this docket on October 29, 1998, unless otherwise noted.

Commission to condition this merger to constrain AT&T/TCI's ability and incentive to abuse its exclusive control of broadband access to the home.

## I. INTRODUCTION AND SUMMARY

On October 29, 1998, GTE and many other parties filed comments in opposition to the proposed merger between AT&T and TCI. Like most commenters, GTE is troubled by the ability and incentive the merged entity will have to abuse its exclusive control of broadband access to the home. Recent statements by the principals of AT&T and TCI heighten this concern, since they reveal a more accurate view of the merged entities' plans than can be found in the application on file with the Commission.<sup>3</sup>

As Consumers Union *et al.* pointed out, AT&T/TCI "have not made commitments to promote, rather than inhibit, choice, competition, and diversity."<sup>4</sup> In fact, the *Description of Transaction*<sup>5</sup> does not adequately address the proposed merger's effect on competition.<sup>6</sup> That does not mean, however, that there is not information available

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<sup>3</sup> Several commenters pointed out the lack of specific details in the merger application. See, e.g., Comments of Qwest Communications Corporation at ii (Qwest Comments) ("Qwest recognizes that AT&T and TCI have attempted to argue that their proposed merger will have only positive competitive effects on the local markets. However, Qwest respectfully submits that the Applicants' unsupported assertions cannot constitute an adequate record on which to base a decision regarding the merger."); Petition to Deny of Consumers Union, Consumer Federation of America, and Office of Communication, Inc. of the United Church of Christ at iii (Consumers Union *et al.* Comments) ("AT&T/TCI have failed to establish their entitlement for Commission approval of their application. Despite the size and scope of this unprecedented merger, AT&T/TCI have presented stunningly sparse and conclusory documentation of their plans and intentions.").

<sup>4</sup> Consumers Union *et al.* Comments at iii.

<sup>5</sup> See Exhibit B-6 to FCC Form 327, filed by Tele-Communications, Inc. on August 31, 1998 ("*Description of Transaction*").

<sup>6</sup> See, e.g., Comments of America Online, Inc. at 47 (America Online Comments) (stating that AT&T/TCI "include in their CARS license transfer applications a 'just-in-  
(Continued...)

regarding the intentions of the parties involved: the principals of both AT&T and TCI recently have made public statements that spell out their plans quite explicitly. For instance, on November 2, 1998, C. Michael Armstrong, the Chairman and CEO of AT&T, addressed the Washington Metropolitan Cable Club. During his speech, Armstrong made it clear that the merged entity is determined to deny competing ISPs access to its broadband facilities:

Now some narrowband Internet service providers want the government to give them a free ride on [TCI's] broadband pipes. Their idea is to allow these narrowband companies to provide broadband access service to their customers over facilities that someone else built. If those companies want to move up into broadband, terrific. But getting a free ride on someone else's investment and risk is not the way to do it.<sup>7</sup>

And Leo Hindery, at the time the President (and now, once again, the CEO<sup>8</sup>) of TCI Communications, has conceded to the full Commission that consumers who wish to access the content of an ISP other than TCI-controlled @Home will have to pay twice in order to do so.<sup>9</sup> Clearly, one of the motives inspiring this unprecedented merger is the ability and desire to restrict consumer choice and competition.

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(...Continued)

case' *Description of Transaction* that focuses, for Internet-related purpose[s], exclusively on 'end-user Internet services,' and summarily dismisses any potential for anticompetitive impact.").

<sup>7</sup> C. Michael Armstrong, "Telecom and Cable TV: Shared Prospects for the Communications Future," as delivered to the Washington Metropolitan Cable Club, Washington, D.C., November 2, 1998 (visited November 13, 1998) <<http://www.att.com/speeches/98/981102.maa.html>> (*Armstrong Speech*).

<sup>8</sup> See "Hindery Retakes TCIC CEO Job," (visited November 13, 1998) <<http://www.multichannel.com>>.

<sup>9</sup> See Telecom Mergers: En Banc hearing on Telecom Mergers to Discuss Recent Consolidation Activities in the Telecommunications Industry, Focusing on Three of the Proposed Mergers Before the Federal Communications Commission (October 22, 1998) (Testimony of Leo Hindery, President of Tele-Communications, Inc.).

As GTE stated in its Comments In Opposition, the Commission must address the grave competitive concerns raised by this merger in a direct and forthright fashion. Upon approval of this proposed merger, AT&T/TCI will have the ability and incentive to exercise its combined market power in virtually every segment of the communications services market. As a result, to the extent that AT&T/TCI provides telephony over its cable facilities, the Commission must impose ILEC-like regulations on the merged entity.

In addition, because of AT&T/TCI's expressed intention to deny competitors access to its broadband facilities, this merger will produce anticompetitive results in the provision of bundled services as well as upstream component services. Under the governing *Bell Atlantic/NYNEX* standard, the Commission cannot approve this merger without assuring – through whatever means it deems appropriate – that AT&T/TCI will unbundle high-speed Internet access provided over its cable systems and make that offering available to all ISPs on a nondiscriminatory basis.<sup>10</sup>

GTE is by no means the only commenter concerned about this proposed merger. There is substantial record support for the relief GTE seeks. For example, there is broad consensus – cutting across all segments of the industry – that there is no rational basis for treating AT&T/TCI differently from ILECs simply because it uses coaxial cable rather than copper wire. Indeed, as Qwest pointed out, “AT&T/TCI will control a greater number of local loops and have a larger number of local loop customers than

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<sup>10</sup> Furthermore, as GTE explained in its Comments in Opposition, TCG, which AT&T recently acquired, apparently provided telephone exchange service in certain TCI markets as of January 1, 1993. Accordingly, in these service areas, the proposed merger would violate section 652 of the 1996 Act. GTE Comments at 49-50.

Ameritech, U S West, or any of the independent ILECs.”<sup>11</sup> ILECs, IXCs, and ISPs thus all support the imposition of Section 251(c)-like obligations on AT&T/TCI, based on the principle of regulatory parity<sup>12</sup> and the plain language and intent of the Act.

A wide range of commenters also joined GTE in recognizing that the merged entity’s ability to deny competitors access to its essential broadband facilities would pose a serious threat to competition in the provision of bundled services. A number of parties further noted that AT&T/TCI would be able to take immediate advantage of its facilities monopoly and would be virtually unrestrained by competition in the provision of bundled service offerings, at least for the next several years. Accordingly, these commenters urged the Commission to require AT&T/TCI to unbundle high-speed Internet access provided over its cable systems, and to make that offering available to all ISPs on a nondiscriminatory basis.

The message from the comments is clear and undisputed: permitting this merger to proceed without taking steps to counter the merged entity’s considerable market power would restrict consumer choice and harm competition in a multitude of communications-related markets. Adoption of the conditions and requirements summarized above and discussed fully below accordingly is necessary to assure that the merger of AT&T and TCI truly serves the public interest.

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<sup>11</sup> Qwest Comments at i.

<sup>12</sup> “A cardinal principle of lawful administrative process is even-handed treatment.” Comments of SBC Communications Inc. at ii (SBC Comments).

**II. THERE IS BROAD SUPPORT FOR THE IMPOSITION OF ILEC-LIKE CONDITIONS ON THE MERGED ENTITY.**

As GTE showed in its Comments, to the extent that AT&T/TCI provides telecommunications services over its cable facilities, the merged entity must be regulated at parity with the ILECs.<sup>13</sup> Under Section 251 of the Act, Congress established a framework for the development of competitive markets for telecommunications services. Sections 251(a) and (b) establish general duties applicable to all "telecommunications carriers" and all "local exchange carriers," respectively; the merged entity clearly falls within both of these definitions. Furthermore, the obligations imposed under Section 251(c) are equally applicable to AT&T/TCI, as a result of its control of the broadband cable loop, as they are to GTE and the other ILECs. The alternative, allowing AT&T to provide telephone service on a wholly unregulated basis simply by utilizing a cable company's facilities, would undermine the plain language and intent of the Act.

First, a basic telephone service offered to customers, whether using AT&T's wireline facilities or TCI's cable facilities, clearly falls within the definition of "telecommunications."<sup>14</sup> As a result, the offering of local and/or long distance service by AT&T/TCI over TCI's cable system renders the merged entity a "telecommunications

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<sup>13</sup> In the past, the Commission has, on numerous occasions, interpreted Sections 1, 2, 4(i), 201, and 202 in a manner that would give it broad jurisdiction to extend obligations similar to those in Section 251(c). See GTE Comments at 16-17.

<sup>14</sup> "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).



carrier”<sup>15</sup> subject to the interconnection and interoperability mandates of Section 251(a) of the Act.

Second, the provision of local exchange service over TCI's cable facilities renders AT&T/TCI a “local exchange carrier.”<sup>16</sup> Voice telephony provided via cable television facilities is a “comparable service,” as that term is used in the definition of “telephone exchange service.”<sup>17</sup> Indeed, in assessing this statutory provision, the Commission has explained that Congress intended to bring within the definition of “telephone exchange service” the provision of service using “alternative local loops.”<sup>18</sup> To assure consistent treatment with LECs using non-cable facilities, AT&T/TCI must be subject to the discounted resale, access-to-rights-of-way, number portability, and other provisions of Section 251(b).

Finally, the merged entity's exclusive control of TCI's broadband cable distribution plant requires equal treatment from the Commission vis-à-vis its treatment of the narrowband copper loop provided by the ILECs: to the extent that the local loop is considered a bottleneck, the broadband HFC link provided by AT&T/TCI is equally a

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<sup>15</sup> “Telecommunications carrier” is defined as an entity providing “telecommunications” for a fee to the public. 47 U.S.C. § 153(44). See also 47 U.S.C. § 153(46) (definition of “telecommunications service”).

<sup>16</sup> “Local exchange carrier” is defined as “any person that is engaged in the provision of telephone exchange service or exchange access.” 47 U.S.C. § 153(26).

<sup>17</sup> “Telephone exchange service” is defined as an intercommunicating service within a telephone exchange, or “comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.” 47 U.S.C. § 153(47).

<sup>18</sup> See *Federal-State Joint Board on Universal Service*, Report to Congress, 11 CR 1312, ¶ 54 (April 10, 1998).

bottleneck. Therefore the Commission cannot lawfully permit the merged entity to operate free from the obligations imposed on ILECs under Section 251(c) of the statute.

Notably, a broad range of commenters, including IXCs, LECs and ISPs, supported regulating AT&T/TCI at parity with ILECs. For example, Qwest warned that “[a]llowing AT&T/TCI to function like an ILEC without the obligations of Section 251 would seriously undermine the procompetitive framework established by the '96 Act.”<sup>19</sup> Qwest pointed out that the merged entity will have the potential to become one of the largest local exchange providers,<sup>20</sup> with “immediate access to over 20 million local loops, and potential access to another 13 million.”<sup>21</sup> Motivated by AT&T/TCI's ability to control access to these loops, Qwest urged the Commission to impose ILEC-like conditions on AT&T/TCI: “the public interest demands that any carrier with the local voice, video, and data market power that AT&T/TCI will have should be subject to the unbundling, resale, and interconnection obligations of Section 251(c).”<sup>22</sup>

MCI WorldCom and Sprint, AT&T's largest competitors in the long distance market, also expressed concern about the harm that will result from allowing AT&T/TCI

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<sup>19</sup> Qwest Comments at 15. Qwest “is a multimedia communications company which, through its subsidiaries, offers a wide range of retail voice, data, video, and information services over its high-speed network, including domestic and international long distance services, Internet access, Internet protocol (“IP”) telephony, web hosting, and web content services.” *Id.* at 2.

<sup>20</sup> Qwest asserted that “AT&T/TCI will control a greater number of local loops and have a larger number of local loop customers than Ameritech, U S West, or any of the independent ILECs.” *Id.* at i.

<sup>21</sup> *Id.* at 12.

<sup>22</sup> *Id.* at 16.

to provide telecommunications services outside of the regulatory framework imposed on ILECs. As Sprint explained:

AT&T's acquisition of TCI will enable it to re-establish itself – less than fifteen years after divestiture – as a vertically-integrated entity capable of providing, over its own facilities, not only long distance service but also, uniquely, the origination and termination of such service to mass market customers.<sup>23</sup>

Sprint also pointed out that AT&T/TCI, unconstrained by the provisions of Section 251, will have the ability and the incentive to leverage control of its local loops in order to “shut out” long distance competitors: “The inability to interconnect with AT&T's local customers would . . . seriously degrade a competitor's long distance service.”<sup>24</sup> Sprint asked the Commission to take action now in order to avoid this anticompetitive result:

The Commission must require that AT&T provide reasonable and non-discriminatory access at reasonable points of interconnection, in accordance with reasonable and non-discriminatory network standards, to the cable facilities acquired or utilized by AT&T to provide its own common carrier services.<sup>25</sup>

MCI WorldCom likewise contended that “because of its dominance and monopoly position in the marketplace . . . AT&T/TCI should be subject to unbundling requirements for its platform that are akin to those set forth in Section 251(c) of the 1996 Act.”<sup>26</sup> It urged the Commission not to accept AT&T/TCI's argument that “cable telephony” is immune from common carrier regulation:

AT&T/TCI appears to create a distinction between “cable telephony” and telephony provided over traditional telephony infrastructure. We see no

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<sup>23</sup> Comments of Sprint Corporation at 12 (Sprint Comments).

<sup>24</sup> *Id.* at 18.

<sup>25</sup> *Id.* at 21.

<sup>26</sup> Comments of MCI WorldCom, Inc. at 13 (MCI WorldCom Comments).

justification for such a regulatory distinction. Once the merged entity commences the provision of telephony services over its cable infrastructure, those services must be subject to Title II regulation. . . . Title II of the Communications Act applies to the provision of telecommunications services, regardless of the technology used to provide the service.<sup>27</sup>

In addition to GTE, three other companies with substantial ILEC operations – SBC, Ameritech, and U S WEST – submitted comments emphasizing that allowing AT&T/TCI to provide telecommunications services free from the regulatory constraints of Section 251 would undermine the procompetitive goals of the 1996 Act and the Commission's attempts to effectuate those goals in a technology-neutral manner. As SBC noted, "pursuant to the mandate of the 1996 Act, the Commission has recently imposed extensive resale and unbundling obligations on incumbent local exchange carriers. To the extent this logic is valid, it applies with equal force here, to the TCI cable systems that AT&T proposes to acquire."<sup>28</sup> Ameritech likewise cautioned that:

The Commission should not tolerate an uneven regulatory playing field. To the extent AT&T, including its affiliates, is offering advanced telecommunications capability, it should be subject to the same regulatory requirements that apply to other providers of advanced telecommunications capability.<sup>29</sup>

Thus, there is support from virtually every segment of the telecommunications industry for imposing ILEC-like regulations upon the merged entity.

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<sup>27</sup> *Id.* at 4-5.

<sup>28</sup> SBC Comments at 13.

<sup>29</sup> Comments of Ameritech at 11-12 (Ameritech Comments). See also Petition of U S WEST to Deny Applications or to Condition Any Grant at 27 (U S WEST Comments) ("The Commission should, in order to protect competition, impose analogous access, nondiscrimination, and related requirements as conditions of approval of the merger.")

The Commission should heed the concerns voiced in this proceeding and assure that AT&T/TCI does not avoid regulation for the sole and arbitrary reason that its local loops consist of coaxial cable instead of copper wire. Specifically, the Commission must impose the following conditions upon the merged entity: (i) interconnection at any technically feasible point; (ii) discounted resale of retail telecommunications and cable services;<sup>30</sup> (iii) access to unbundled network elements (including, at the very least, the broadband "loop" and backbone facilities) at any technically feasible point; and (iv) collocation at the cable head-end and network nodes of equipment necessary for interconnection and access to unbundled network elements. AT&T/TCI also should be subject to equal access obligations that permit customers to presubscribe to the IXC and ISP of their choice and to cost-allocation and accounting requirements like those applicable to the Tier I ILECs.<sup>31</sup> In addition, the Commission should confirm that Section 251(b) applies to AT&T/TCI to the extent it provides exchange and exchange access services.

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<sup>30</sup> In its comments, SBC stated that "[i]f the Commission is to maintain a consistent approach, it must . . . condition this merger upon a requirement that TCI make its monopoly cable services available for resale on a nondiscriminatory and competitively neutral basis." SBC Comments at 14.

<sup>31</sup> See, e.g., U S WEST Comments at iv, 37-38 ("[T]he Commission should require commitments regarding cost allocation, . . . comparable to the rules that apply to incumbent LECs."); MCI WorldCom Comments at 4, 14-15 (The Commission should "require the merged company to allocate costs among cable and non-cable services according to more detailed cost allocation rules.").

**III. THE COMMISSION MUST REQUIRE AT&T/TCI TO ALLOW COMPETITORS OPEN ACCESS TO ITS BROADBAND CABLE FACILITIES.**

**A. The Proposed Merger Would Have Serious Anticompetitive Effects on the Provision of Bundled Services Solely Because of AT&T/TCI's Refusal to Provide Open Access to Its Broadband Facilities.**

In its comments, GTE analyzed the competitive effects of the merger using the framework employed in the *Bell Atlantic/NYNEX* proceeding.<sup>32</sup> Under this review, GTE assessed the probable impact of the merger on the provision of bundled telecommunications and cable services, focusing on the areas served by TCI's cable systems.<sup>33</sup> In these geographic areas, the merged entity would be virtually unchallenged in its ability to offer broadband Internet access and to leverage this advantage into dominance in the provision of bundled services.

As Ameritech noted in its comments, what sets the union of AT&T and TCI apart from other recent realized and proposed mergers in the telecommunications industry is AT&T/TCI's ability to avoid the open network and equal access construct within which other facilities-based telecommunications carriers operate.<sup>34</sup> While other mergers have been motivated by opportunities to achieve scale and efficiencies, the AT&T/TCI merger is all about exploiting perceived gaps in current regulations in order to foreclose

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<sup>32</sup> No commenter shared AT&T/TCI's belief, see *Description of Transaction* at 14, that the Commission need not conduct a *Bell Atlantic/NYNEX* analysis in this instance.

<sup>33</sup> GTE explained that bundled offerings comprised of local/LD telephone, Internet access, ISP content and cable service constitutes a separate product market under the "demand substitutability" test, as applied by the FCC and the courts in the antitrust context. See GTE Comments at 20-25. A number of commenters also recognized the importance of assessing the impact of the proposed merger on this market for bundled services. See, e.g., U S WEST Comments at 9-15; Comments of EchoStar Communications Corporation at 2-7 (EchoStar Comments); Ameritech Comments at 8; SBC Comments at 2-4.

competition.<sup>35</sup> As gatekeeper to the only viable widespread broadband network, AT&T/TCI would have the power to dictate the terms and price of competitors' access to its facilities -- if it decides to allow access at all. Indeed, numerous commenters acknowledged, as did GTE, that the key to AT&T/TCI's power grab lies in the merged entity's exclusive control over essential facilities.<sup>36</sup> America Online, for example, warned that AT&T/TCI's ability to bar competitors from its last-mile facilities would preclude competition on the basis of price, performance and features.<sup>37</sup>

As GTE and other parties noted, the combined company would be uniquely positioned to take immediate advantage of this facilities monopoly. The record establishes that AT&T/TCI would be unrestrained by competition in the provision of broadband services, at least for the next several years. Indeed, consumers, satellite service providers, ILECs and ISPs alike pointed out that AT&T/TCI has a considerable head start in deploying broadband facilities and that competitors face considerable regulatory and technical hurdles to entry that could slow the development of meaningful competition.<sup>38</sup>

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<sup>34</sup> See Ameritech Comments at 11.

<sup>35</sup> See Consumers Union *et al.* Comments at 11-14 ("[t]he AT&T/TCI business plan for offering high-speed Internet services on TCI's cable plant is [based on] . . . the same anti-competitive model that the cable industry used to acquire monopoly power and restrict program diversity in cable television").

<sup>36</sup> See GTE Comments at 9; U S WEST Comments at 9-11.

<sup>37</sup> See America Online Comments at 14-16.

<sup>38</sup> See Consumers Union *et al.* Comments at 11 ("[f]or many, perhaps most, American citizens, their first opportunity to obtain high bandwidth Internet access will be through cable systems"); U S WEST at 10 ("no competitors will be in a position to offer a comparable package of services any time soon"); EchoStar Comments at 5

(Continued...)

Several additional factors enhance AT&T/TCI's first mover advantage. AT&T has announced its intent to provide a massive capital infusion to upgrade TCI's cable facilities and hasten the completion of a ubiquitous broadband network.<sup>39</sup> Also, by combining AT&T's unparalleled customer base and TCI's cable subscribers, AT&T/TCI would be given the instant ability to cross-market its component services.<sup>40</sup> Finally, AT&T's long distance brand name and expertise in telecommunications would further heighten the appeal of the merged entity's bundled offering.<sup>41</sup>

These factors, by themselves, do not constitute anticompetitive conduct. Put together with AT&T/TCI's exclusionary policies, however, they would give the merged entity the ability to quickly lock up customers and exploit the uneven regulatory playing field. This, of course, is precisely what the applicants hope to accomplish. For example, TCI's Chairman has proclaimed that the merged AT&T/TCI entity would play the role of electronic gatekeeper and would force customers and ISPs "to go through us" to obtain the benefits of broadband facilities.<sup>42</sup> The Commission must not permit this intent to be realized.

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(...Continued)

("broadband satellite and wireless technologies will not likely become realities in the next few years"); America Online Comments at 55; GTE Comments at 28-33, 42-43.

<sup>39</sup> See America Online Comments at 55; U S WEST Comments at 2; Sprint Comments at 15.

<sup>40</sup> See MCI WorldCom Comments at 8-9.

<sup>41</sup> See *id.* at 9; U S WEST Comments at 2; Ameritech Comments at 8.

<sup>42</sup> Ken Auletta, "Talk of the Town: How The AT&T Deal Will Help John Malone Get into Your House," *The New Yorker*, July 25, 1998, at 25.



**B. The Merger Raises Additional Vertical Exclusion Concerns.**

In addition to the anticompetitive impact of the merger in the provision of bundled services, the merger would raise vertical exclusion concerns. In its Comments, GTE explained that the merged entity's ability to bar access by competitors to its essential broadband facilities would harm competition in the "upstream" markets for services offered via broadband facilities.<sup>43</sup> Without an open access requirement, AT&T/TCI would be able to control the telecommunications and Internet services available to its cable customers.

Several commenters shared this concern. U S WEST, for example, warned that AT&T/TCI's vertical integration would constitute a considerable danger to long distance competition: "[t]he combined company would have every reason to try to use its position in the broadband market also to preclude competition in the market for long distance voice services."<sup>44</sup> Likewise, several ISPs expressed concern that AT&T/TCI will have the ability and the incentive to use its position as gatekeeper to favor its @Home service and stifle competition in the upstream market for Internet services.<sup>45</sup> As MindSpring noted, a "closed system world," as foreshadowed by AT&T/TCI's vision for cable broadband, "would threaten the competition and innovation that have driven

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<sup>43</sup> See GTE Comments at 39; see also GTE Comments at Attachment 1 "Statement of Professor Daniel F. Spulber" at 12-17.

<sup>44</sup> See U S WEST Comments at 18 (also recognizing the danger of competitive harm in downstream markets for data traffic); see also Sprint Comments at 16 (AT&T may choose to "leverage whatever power it gains in the access market to raise the costs to rivals in the larger long distance market"); MCI WorldCom Comments at 7-14.

<sup>45</sup> See Comments of MindSpring Enterprises, Inc. at 6 (MindSpring Comments); America Online Comments at 15; U S WEST Comments at 10 (the merger will "enable TCI to expand its monopoly in cable service into the market for high-speed Internet

(Continued...)

Internet and other advances to date -- consumers would pay higher prices and receive inferior service." And MVPDs recognized that AT&T/TCI would seek to use its exclusive control over broadband access to cement its dominance of the MVPD market. In EchoStar's words, "[t]his deal will thus take an already dominant MVPD distributor, turn it into a distributor with virtually unlimited bandwidth by virtue of *resources that it will exclusively control*, and pit it against bandwidth-constrained distributors that are already handicapped in their efforts to compete."<sup>46</sup>

**C. Based On These Concerns, An Open Access Requirement Is Necessary.**

Given the potentially devastating effects of the proposed merger on competition in numerous product markets, the Commission must require AT&T/TCI to allow open, competitive access to its broadband cable network facilities. Such access is necessary to enable potential competitors -- ILECs, CLECs, MVPDs and ISPs -- to offer consumers alternative bundled service offerings and to minimize the anticompetitive impact in upstream markets. Importantly, there is no countervailing legal or policy reason to permit the merger to proceed without such a condition.<sup>47</sup> As GTE explained,

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(...Continued)  
access").

<sup>46</sup> EchoStar Comments at 6 (emphasis added).

<sup>47</sup> Nor is there any technical reason. As Ameritech noted, such open access "would not require costly reconfiguration of the TCI-controlled cable system." Ameritech Comments at 21 (suggesting that AT&T/TCI could simply add or modify "router/proxy servers" in their cable headends to connect subscribers with the facilities of a preferred ISP); see also MindSpring Comments at 18-19.

such open access is fully consistent with bedrock policies underlying Title VI of the Communications Act.<sup>48</sup>

AT&T's and TCI's arguments against imposition of an open access requirement are entirely unpersuasive. First, they state that they will in fact offer "open access" to ISPs.<sup>49</sup> AT&T/TCI's proposed version of "open access," however, still requires customers to pay twice in order to use an on-line service provider other than @Home.<sup>50</sup> It also enables TCI to impose arbitrary contractual requirements on services using its facilities, which serve no purpose other than to insulate TCI from cable competition.<sup>51</sup>

Second, AT&T has suggested that it must be allowed to deny open access to competitors in order to guarantee recovery of its investments.<sup>52</sup> However, as

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<sup>48</sup> See GTE Comments at 46-48; see also SBC Comments at 14, n.47.

<sup>49</sup> TCI's President Leo Hindery conceded that AT&T/TCI customers should not have to pay twice to access a different online service provider than @Home. See Ameritech Comments at 22. AT&T's Michael Armstrong stated that "our open broadband would be predicated on customer choice and that the broadband facilities would be an open gateway to the Internet." *Id.*

<sup>50</sup> See America Online Comments at 13-14, n.29.

<sup>51</sup> For example, TCI's affiliate, @Home, already employs such a tactic, restricting to 10 minutes the Internet-delivered video streaming that may be delivered over TCI's broadband facilities. See America Online Comments at 12 n.27, 14; see also Consumers Union *et al.* Comments at 13.

<sup>52</sup> See *Armstrong Speech* ("[n]o company will invest billions of dollars and become a facilities-based broadband services provider if competitors . . . can come along and get a free ride on the investments and risks of others"). This argument rather shockingly contradicts AT&T's argument that ILECs must price access to their facilities at hypothetical forward-looking cost to assure fair competition, and that doing so will in no way diminish ILECs' investment incentives or deprive them of a fair profit. See Reply Comments of AT&T Corp., CC Docket No. 98-147, at 14-15 (filed Oct. 16, 1998). Furthermore, AT&T's suggestion that competitors are demanding a "free ride" on its facilities is absurd. GTE is not aware of any commenter that has argued that AT&T/TCI be precluded from charging a price consistent with what ILECs are permitted to charge for access to their facilities.

recognized by several commenters, what AT&T essentially is asking for goes beyond mere cost recovery: it is seeking the ability to reap supra-competitive, monopoly profits for the use of its essential facilities. In this regard, EchoStar explained that "a requirement of open access on reasonable terms will merely ensure that the profits the company will earn are competitive, not monopoly profits."<sup>53</sup> Likewise, MindSpring explained that open access would "ensure that [AT&T/TCI] will behave as they would in a competitive market."<sup>54</sup> There is thus no obstacle to imposing an open access requirement on AT&T/TCI, and there are compelling reasons to do so.<sup>55</sup>

#### **IV. CONCLUSION**

To preserve consumer choice and the opportunity for fair competition, the Commission must not approve the merger of AT&T and TCI without taking steps to prevent the new company from exercising its considerable market power. First, to the extent AT&T/TCI offers local and long distance telecommunications services over TCI's broadband cable facilities, the merged company plainly is subject to Sections 251(a) and (b) of the Communications Act. In addition, AT&T/TCI must comply with the same unbundling, discounted resale, collocation, interconnection, equal access, and accounting obligations that apply to ILECs. There is no rational basis for applying less rigorous regulation to AT&T/TCI, given its exclusive control of broadband distribution facilities to the home. Finally, competing ISPs must be afforded open, non-

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<sup>53</sup> EchoStar Comments at 7.

<sup>54</sup> MindSpring Comments at 18.

<sup>55</sup> To the extent the Commission determines that the proposed merger raises concerns that are better addressed in the context of a full rulemaking proceeding, it should defer action on the Application until the completion of any such proceeding. See GTE

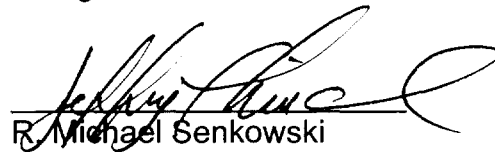
(Continued...)

discriminatory access to TCI's broadband infrastructure in order to prevent the merged company from impeding competition in the provision of bundled services and in vertical markets for information services, Internet access, long distance, and MVPD service.

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Comments at 48-49.

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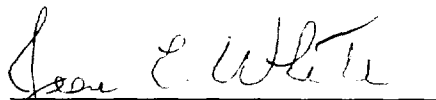
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